IRVIN D. BIRD, JR.

IBLA 83-44 Decided May 27, 1983

Appeal from decision of the Nevada State Office, Bureau of Land Management, rejecting sodium prospecting permit applications. N 36608 and N 36609.

Affirmed.

1. Applications and Entries: Generally -- Bureau of Land Management -- Mineral Lands: Prospecting Permits -- Mistakes -- Sodium Leases and Permits: Permits -- Words and Phrases

"Notation rule." Under the "notation rule" when the official records of the Bureau of Land Management have been noted to reflect the devotion of land to a particular use which is exclusive of other conflicting uses, no incompatible rights in that land can attach by reason of any subsequent application or entry until the record has been changed to reflect that the land is no longer so segregated. The rule generally applies even where the notation was posted to the records in error, or where the segregative use so noted is void, voidable, or has terminated or expired, so long as the records continue to reflect it as efficacious.

2. Applications and Entries: Filing -- Mineral Lands: Prospecting Permits -- Sodium Leases and Permits: Permits

Under 43 CFR 3501.1-6, the Bureau of Land Management must reject applications for prospecting permits that are filed for lands not available for prospecting.

APPEARANCES: Irvin D. Bird, Jr., pro se; Ronald M. Johnson, Esq., Washington, D.C., for St. Regis Paper Company; R. R. Forsythe, Tacoma, Washington, for Mason Smith.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Irvin D. Bird, Jr., has appealed the decision of the Nevada State Office, Bureau of Land Management (BLM), dated September 16, 1982, rejecting in part two sodium prospecting permit applications, N 36608 and N 36609, for lands in the Rhodes Salt Marsh because BLM records showed that, at the time the applications were filed, the lands were within a known leasing area (KLA) for sodium and therefore were only subject to competitive leasing. 1/

Appellant submitted his prospecting permit applications to BLM on May 28, 1982. He argues that BLM was notified by the Minerals Management Service (MMS) on May 19, 1982, that the Rhodes Salt Marsh was not now known to contain valuable deposits of sodium compounds and that the previous determination of the Geological Survey ("Survey" was MMS' predecessor) that a portion of the marsh was subject to competitive leasing only was rescinded. 2/ Appellant adds that subsequent communications between BLM and MMS reveal that MMS reported the effective date of its determination to be May 6, 1982.

In addition to appellant's permit application files, BLM has submitted for our review file N 7941 concerning a competitive lease sale for the lands at issue and the permit application files for two conflicting applicants. Review of these files reveals the following. After receiving a sodium prospecting permit application (N-3552) in 1969 from St. Regis Paper Company for lands in the Rhodes Salt Marsh, BLM requested that Survey report on the status of the lands. Survey responded that the permit should be rejected as to much of the identified lands because of the presence of a valuable deposit of sodium sulfate and recommended that these lands be competitively leased. Thereafter, because some interest had been expressed in leasing the lands and based on a further report from Survey in 1970, BLM determined to hold a competitive lease sale for the lands. 3/ In 1974 BLM initiated the requisite environmental review for lease sales. It was completed in August 1977. Meanwhile AIM, Inc., expressed interest to BLM in leasing the lands in the Rhodes

1/ The lands rejected as KLA in application N-36608 included S 1/2 SE 1/4 Sec. 10, W 1/2 W 1/2 sec. 14, E 1/2 E 1/2, S 1/2 SW 1/4, W 1/2 Se 1/4 sec. 15, T. 5 N., R. 35 E., Mount Diablo meridian. The lands at issue in application N-36609 are N 1/2 NE 1/4, NW 1/4 sec. 22, T. 5 N., R. 35 E., Mount Diablo meridian. The remaining lands in the two applications either were rejected because they were patented without reservation of mineral rights or were suspended because of conflicts with earlier-filed applications. By letter dated Dec. 17, 1982, appellant submitted a withdrawal of his applications relating to most of the lands not at issue in this appeal.

2/ See Memorandum to Nevada State Director, BLM, from Acting District Mining Supervisor, Western Region, MMS, dated May 14, 1982, "Elimination of 'Known-To-Be-Valuable-For-Sodium' Classification, Rhodes Salt Marsh."

3/ The lands to be offered for competitive bid were: S 1/2 SE 1/4 sec. 10, W 1/2 W 1/2 sec. 14, E 1/2 E 1/2, W 1/2 SE 1/4, S 1/2 SW 1/4 sec. 15, N 1/2 NE 1/4, NW 1/4 sec. 22, T. 5 N., R. 35 E., Mount Diablo meridian. See Memorandum to Manager, Land Office, BLM, Reno, from Director, Survey, dated Aug. 10, 1970.

Salt Marsh in January 1976. BLM requested an update of Survey's 1970 report on the lands in March 1978. During a joint BLM/Survey field review in June 1978 it was suggested that a reevaluation of the potential for mining these lands might be desirable, although a review was apparently not undertaken at that time. In June 1980 AIM, Inc., indicated that it was no longer interested in a competitive lease sale for the Rhodes Salt Marsh because of the long delay in processing. Because there was no other current interest in such a sale, BLM's adjudicator changed the status of the sale and file N 7941 to inactive.

The receipt of a prospecting permit application from Mason Smith for lands in Rhodes Salt Marsh (N 30646) on August 25, 1980, again gave rise to the question of the status of the marsh. BLM requested a report from Survey which responded that some of the lands identified in the application were within a sodium KLA and should be rejected. By decision dated May 14, 1981, BLM followed Survey's recommendation and rejected those lands. However, as part of its continuing evaluation of the Smith application, BLM requested recommendations and a report from Survey in November 1981 as to revocation of the KLA classification preventing prospecting in the marsh.

On December 2, 1981, St. Regis Paper Company submitted a prospecting permit application (N 34924) for approximately the same lands in the marsh. BLM requested a report from Survey on this application and iterated its request concerning the classification change in December 1981.

As appellant has reported, by memorandum dated May 14, 1982, MMS reported that the Rhodes Salt Marsh is not known to contain valuable deposits of sodium compounds and rescinded its "known-to-be-valuable" determination. On June 18, 1982, MMS added that it considered the effective date of this change to be May 6, 1982.

The record reflects that there may have been some confusion within BLM as to the effect of the reclassification of the lands. On July 14, 1982, a BLM adjudicator designated the KLA classification and the lease sale file N 7941, as "Dead" as of May 6, 1982, although the use plat notation for the competitive lease sale was not removed until August 31, 1982. The prospecting permit applications of Mason Smith and St. Regis Paper Company were rejected as to the lands within the KLA for sodium by BLM on July 20, 1982. 4/ On August 17, 1982, however, BLM vacated these decisions because the KLA classification "may be subject to change."

On September 7, 1982, BLM received a followup memorandum from MMS that stated in part:

> By memorandum dated June 18, 1982, the Acting District Mining Supervisor, Phoenix AZ, had confirmed a verbal discussion with the Chief, Lands and Minerals Operations, that the KLA Classification for Rhodes Marsh was revoked on May 6, 1982. As a point of

4/ Smith's application was rejected in May 1981 as to 560 acres of land in the Rhodes Salt Marsh based on a March 1981 report from Survey that those lands were in a KLA for sodium. No appeal was filed. BLM's July 20, 1982, decision rejected 200 additional acres within the KLA omitted from the 1981 decision.

> fact, the Rhodes Marsh area has never been formally designated a KLA; it had, however, been designated as a known to be valuable area.
>
> The purpose of this memorandum is to notify you that the May 6, 1982, determination rescinds any previous classification determination for this area and therefore the Rhodes Marsh is now, and in effect always has been, subject to prospecting. Part of the confusion surrounding this classification lies in the fact that the MMS previously determined that the existence of sodium was "known" but only in certain portions of Rhodes Marsh while workability (mining feasibility) has never been "known" for the area.

Thereafter, BLM rejected appellant's permit applications as well as those of Mason Smith and St. Regis Paper Company, by similar decisions dated September 16, 1982, as to the lands at issue in this appeal because, at the time each filed the applications, the lands "were shown on the records of the Nevada State Office as being within a Known Leasing Area for sodium and were, therefore, available for leasing only under the competitive leasing provisions of the Mineral Leasing Act of 1920."

Following transmittal of appellant's notice of appeal, BLM notified the Board that both Smith and St. Regis should have been named adverse parties in the decision issued to appellant because of their conflicting permit applications. They were then notified of that status and have since submitted answers to appellant's statement of reasons. Our review of the case files for their permit applications and answers reveals that neither party appealed BLM's September 16, 1982, rejection of their permit applications in part. Both Smith and St. Regis argue that they have an interest adverse to appellant's by virtue of their earlier-filed applications. Both argue that if this Board reinstates appellant's applications, fairness requires that their applications also be reinstated and that all of the applications be adjudicated by BLM based on their original priority of filing. If Smith and St. Regis had wished to preserve their respective priorities it was incumbent upon each to have appealed BLM's rejection of their permit application. As to those applications, since no appeals were filed, the BLM decisions have become final for the Department and Smith and St. Regis do not have interests adverse to appellant's based on those applications. See Burnham Chemical Co. v. Krug, 81 F. Supp. 911, 913 (D.D.C. 1949); Bruce C. Newcomb, 48 IBLA 263 (1980). St. Regis reports that it also filed a prospecting permit application after August 31, 1982. Based on this interest, St. Regis' arguments that BLM's decision should be upheld have been considered.

Under section 23 of the Mineral Leasing Act of 1920, 30 U.S.C. § 261 (1976), and 43 CFR 3510.1-1, the Secretary of the Interior may grant to qualified applicants prospecting permits that give an exclusive right to prospect for sodium on unclaimed and undeveloped areas of mineral deposits in public and acquired lands. Section 24 of the Act, 30 U.S.C. § 262 (1976), provides, however, that the Secretary shall lease lands "known to contain valuable deposits" of sodium "through advertisement, competitive bidding, or such other methods as he may by general regulations adopt." Competitive leasing may be

initiated by an applicant or BLM upon evidence that land is valuable for sodium including information as to the character, extent, and mode of occurrence. 43 CFR 3521.2-1(a)(1)(v).

When deciding whether issuance of a prospecting permit for certain lands is appropriate, BLM is entitled to rely on the reasoned opinion of MMS as its technical expert in matters concerning the geologic evaluation of tracts of land. Philip Shaiman, 25 IBLA 177 (1976); James C. Goodwin, 9 IBLA 139, 143-44, 80 I.D. 7, 9-10 (1973). Thus, MMS advises whether it considers land sought to be valuable for a particular mineral and BLM may act on that advice. This Board has ruled, nevertheless, that prospecting permit applications should be reconsidered by BLM when Survey reevaluates and reverses its recommendation that lands specified in a particular permit application are not subject to prospecting, Philip Shaiman, supra, or when Survey's recommendation on an application is shown to be in error on appeal. James C. Goodwin, supra. However, those rulings do not address the circumstances of appellant's case where the leasing determination was made separate from the evaluation of appellant's application and was noted to BLM's use plat.

[1, 2] The Department has long held that the availability of land for appropriation or lease must at least initially be determined by recourse to the public records of BLM. Under this so-called "notation rule," if the BLM records have been noted to reflect the devotion of land to a particular use that is exclusive of another conflicting use, no incompatible rights in the land can attach by reason of any subsequent application until the record has been changed to reflect the true status of the land. This rule generally applies even where the notation was posted to the records in error or where the segregative use so noted is void, voidable, or has terminated or expired. Paiute Oil and Mining Corp., 67 IBLA 17 (1982), and cases cited. Thus, even though MMS' assessment that the Rhodes Salt Marsh was subject to leasing may have been reversed as of May 6, 1982, or if it were in error altogether, the land did not become available for prospecting until BLM removed the competitive leasing notation from its records on August 31, 1982. 5/

Furthermore, as a general rule, applications which are accepted for filing must be rejected and cannot be held pending possible future availability of land or interests in land when approval of the application is prevented by the devotion of the land to a different use. 43 CFR 2091.1. More particularly, 43 CFR 3501.1-6 states that "[a]pplications for permits or leases which are filed for lands not available for prospecting or leasing * * * will be rejected." Therefore, BLM should have rejected any prospecting permit application for lands in the competitive leasing area upon receipt. In any case, BLM's rejection of appellant's application was correct.

5/ The rule precludes the use of "insider information" to the disadvantage of the general public which relies on the official land status records of BLM. The rule also serves the cause of orderly administration, in that, otherwise, people would be justified in filing applications of various kinds purely on speculation that, notwithstanding the fact that the official records showed the lands to be unavailable, the records might be in error, or BLM might be persuaded to change the land status.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Nevada State Office is affirmed.

Will A. Irwin
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge